IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)
	) No. S260598
Plaintiff and Respondent,	)
	) No. B295998
vs.	)
	) Los Angeles
VINCE E. LEWIS,	) Superior Court
	) No. TA117431
Defendant and Appellant.	)
	)

APPELLANT/PETITIONER'S
REPLY BRIEF ON THE MERITS

From a Decision of the Court of Appeal,
Second Appellate District, Division 1
on Appeal from the Superior Court of the State of California
in and for the County of Los Angeles
The Honorable Ricardo R. Ocampo, Judge

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ARGUMENT

1. Introduction: The text of section 1170.95, and established principles of statutory construction, require section 1170.95 to be construed more generously to defendants than it was construed by the courts below

A. *The structure of section 1170.95, subdivision (c)*

1. *The statutory text limits the first prima facie case to the petition, not the record of conviction*

The most glaring error in respondent's brief is his patent misreading, throughout his brief, of the first sentence of subdivision (c) of section 1170.95.[1/] That sentence reads, "The court shall *review the petition* and determine if the petitioner has made a

1. Enacted by Senate Bill 1437 of 2018 [Stats. 2018, ch. 1015]; hereafter sometimes "SB 1437." Unexplained section references in this brief are to the Penal Code, and unexplained subdivision references are to section 1170.95.

prima facie showing that the petitioner falls within the provisions of this section." (Emphasis added.) Respondent inexplicably concludes that, "Step one consists of the court's sua sponte review of *the record of conviction*. . . ." (ABM 11, emphasis added; see also ABM 22, 24.) The Legislature could have adopted respondent's preferred statute, but it did not. The relative merit of the two possible statutes, as a matter of policy, was for the Legislature to decide, and it is not for this Court or for respondent to decide that the Legislature chose the wrong one or that the Legislature's handiwork is "absurd" (ABM 28).

The "absurd result" rule "is exceedingly narrow" and must be used with great caution. "We cannot 'ignore the actual words of the statute in an attempt to vindicate our perception of the Legislature's purpose in enacting the law.'" (*People v. Francis* (2017) 16 Cal.App.5th 876, 882, quoting *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 993.) "Each time the judiciary utilizes the 'absurd result' rule, a little piece is stripped from the written rule of law and confidence in legislative enactments is lessened." (*Unzueta v. Ocean View Sch. Dist.* (1992) 6 Cal.App.4th 1689, 1699.)

A different rule of statutory construction is of more value here: *expressio unius est exclusio alterius*. (OBM 16.) "In the grants [of powers] and in the regulation of the mode of exercise, there is an implied negative; an implication that no other than the expressly granted power passes by the grant; that it is to be exercised only in the prescribed mode . . . ." (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195 [brackets in original; inter-

nal citations omitted].) At this step, the court is granted the power to review the petition, not the record of conviction. Respondent erroneously asserts that this canon is limited to statutes containing an "enumerated list." (ABM 30.) *Chickering* concerns a statute conferring a single "power," not an enumerated list.

Respondent asserts that every published opinion on the point agrees with the Court of Appeal here that the record of conviction may be reviewed prior to appointment of counsel. (ABM 12.) More recently, *People v. Cooper* (2020) 2020 Cal.App. LEXIS 836 at pp. *2-*3, *9-*10, held to the contrary, specifically disagreeing with the Court of Appeal opinion in Mr. Lewis's case.[2/]

2. *Mr. Lewis is entitled to prevail whether subdivision (c) requires one prima facie case or two*

Mr. Lewis and respondent agree that subdivision (c) requires the defendant sequentially to plead two different prima facie cases. (OBM 17; ABM 27.) The court below agreed. (*People v. Lewis* (2020) 43 Cal.App.5th 1128, 1140 (*Lewis II*).) Some Courts of Appeal have read subdivision (c) to describe only a single prima facie case. (E.g., *Cooper,* 2020 Cal.App. LEXIS 836

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2. Relatedly, respondent asserts that the "framework" adopted by the Court of Appeal in the present case is the baseline, and the question before this Court is whether that "framework should be jettisoned" as a matter of policy. (ABM 49.) The baseline is actually the statutory text, and the question is whether the Court of Appeal correctly interpreted it as a matter of statutory construction.

at pp. *21-*32.) This subsidiary question is not dispositive of the questions on which this Court granted review; although Mr. Lewis agrees with respondent and the Court of Appeal on this subsidiary question, he disagrees with them on the answers to the questions for review.

Using the words of subdivision (c), Mr. Lewis and respondent distinguish between a prima facie case that the defendant "falls within the provisions" of section 1170.95 and a prima facie case that he is "entitled to relief." Neither party asserts that "entitled" means something different than "eligible," a word that appears elsewhere in the statute but not in subdivision (c). (See *Cooper*, 2020 Cal.App. LEXIS 836 at pp. *25-*26 [treating the two words as synonymous].) The Court's first question for review uses the phrase "eligibility for relief."

As explained at OBM 15-16, the first prima facie case, "falls within the provisions," is best read to mean facial compliance with the requirements of subdivision (a) and (b). Read that way, one could presumably say that the "entitled to relief" prima facie case in the last sentence of subdivision (c) is the only one attributable directly to subdivision (c). This appears to be a fair description of *Cooper* although that opinion is not phrased in exactly this way.

The fundamental point is that Mr. Lewis never had a chance to plead the second prima facie case ("entitled") because the courts below erroneously held that he failed to plead the *first* one ("falls within the provisions").

B. *Respondent's interpretation is inconsistent with the concept of a prima facie case*

Respondent acknowledges that a prima facie case is a low bar, with all factual inferences to be drawn in favor of the defendant. (ABM 38-39.) But respondent also says that the first prima facie case in subdivision (c) "is not fact- or evidence-dependent." (ABM 39.) Respondent is right that evaluation of this or any other prima facie case "does not involve weighing disputed issues" (*ibid.*), but that is because the facts – procedural, substantive, or both – set forth in the *petition* must be taken at face value and cannot be weighed against the record of conviction prior to the appointment of counsel.

Respondent proposes that, at least at the first prima facie step, the court merely test the existing judgment against the new statute, as a matter of law. (ABM 47-48; see also ABM 53-54.) Respondent's analysis is particularly inappropriate in that one of the purposes of section 1170.95 is to provide a defendant with an opportunity to present *additional* facts demonstrating his entitlement to relief, facts that by definition cannot appear in the record of conviction. (Subd. (d)(3).) Any interpretation that precludes that opportunity based only on the existing judgment (which was based on the pre-existing factual record) is inconsistent with the structure and purpose of the statute. Respondent recognizes that a court may not "weigh any disputed facts or evidence" until after an order to show cause has issued." (ABM 26.) But, contrary to respondent's implication, prior to that time the court must draw all factual inferences in favor of the *defendant's* prima facie case

and compare the facts pled, whatever they are, against the amended definition of murder. The comparison is between the facts (substantive and/or procedural) as pled and the new law, not the old judgment and the new law. Argument 3.C, *infra,* returns to this point.

Respondent implicitly assumes that every petition will be prepared on the printed form, and will not contain additional factual proffers. (ABM 12, 46, 50-51.) Nothing in the statute says this; the first sentence of subdivision (c) requires the court to "review the petition," whatever the petition contains, in the light most favorable to the defendant.[3/] (Cf. *Lewis II,* 43 Cal.App.5th at pp. 1128, 1139 & fn. 9 [faulting Mr. Lewis for *not* proffering additional evidence in his pro se petition].)

C. *Section 1170.95 is a remedial statute that should be construed broadly to serve its remedial purpose*

Respondent does not address the rule that a remedial statute such as section 1170.95 is interpreted broadly. (OBM 19-21.) Respondent's arguments that section 1170.95 is "narrow" should be rejected because they are inconsistent with this well-established rule. (ABM 47, 58, 62.) Similarly, the Court should reject respondent's unexplained assertions that other remedies are "ordinary" or "normal" but section 1170.95 is not. (ABM 42,

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3. Respondent's error is an artifact of his belief that the first sentence of subdivision (c) requires review of the record of conviction; he takes the next erroneous step and assumes that this stage is *limited* to the record of conviction.

47, 48, 56; see *People v. York* (2020) 2020 Cal.App. LEXIS 843 at pp. *25-*27 (conc. opn.) [rejecting unexplained assertion that other remedies are "proper" but section 1170.95 is not].)

Subdivision (f) facilitates the broad scope of the section by preserving all other remedies: Section 1170.95 "does not diminish or abrogate any rights or remedies otherwise available to the petitioner." This saving clause should not be read to *narrow* section 1170.95. It means that section 1170.95 does not displace other remedies; it does not mean that other remedies displace section 1170.95. It does not mean that section 1170.95 is *only* available if *no other* remedy is available to the defendant. This clause instructs courts not to put defendants out of court in a belief that they could – and therefore should, or must – choose habeas corpus or some other forum in which to seek a remedy that comes within the letter and spirit of section 1170.95. The saving clause is meant to prevent the argument that the defendant loses not because his claim is without merit but because he presented it in the wrong way. (Cf. ABM 47-49.) If a defendant asserts that he cannot be convicted under amended section 188 or 189, he has pled a prima facie case that he falls within the provisions of section 1170.95. It does not matter if the reason he could not now be convicted can be called "trial error" (ABM 47) or "a challenge to the sufficiency of the evidence" (*People v. Gomez* (2020) 52 Cal.App.5th 1, 16, *pet'n for review pending*, No. S264033).

Respondent mistakenly believes that the statutory and judge-made limits on habeas corpus petitions instruct the

interpretation of section 1170.95, which makes no reference to them. (ABM 48.) The Legislature could have adopted similar limitations for the section 1170.95 remedy, or adopted habeas corpus practice by reference, but it did not. The text it enacted cannot be interpreted to incorporate them sub silentio.[4/] Indeed, since section 1170.95 provides for appointed counsel prior to issuance of an order to show cause, and for the burden of proof to shift to the prosecution, it is manifest that the Legislature adopted something very different from habeas corpus. Its power, and its choice, to do so must be honored. (Cf. *People v. Drayton* (2020) 47 Cal.App.5th 965, 973, 979-980 [distinguishing section 1170.95 from collateral attack as the former involves "an act that no longer qualifies as murder"].)

D. *Section 1170.95 establishes a special proceeding; courts may not deviate from the statutory terms of such a proceeding*

In special statutory proceedings such as the one created by section 1170.95, courts must follow the specific procedures prescribed by the Legislature, and may not import different procedures that are in general use in more common kinds of cases. (OBM 21-22.) The word "jurisdiction" is often used in stating this principle, for example in the cases cited at OBM 22.

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4. The Judicial Council asserted that section 1170.95 is unwise because it does *not* closely follow habeas corpus practice. (*People v. Tarkington* (2020) 49 Cal.App.5th 892, 922 (dis. opn.), *pet'n for review pending*, No. S263219.)

Respondent seizes on the word "jurisdiction," and concludes that this principle does not limit the courts in interpreting section 1170.95, because the courts' fundamental subject-matter jurisdiction to consider Mr. Lewis's petition is not in dispute. (ABM 39-40.) Respondent misses the mark.

The word "procedure" could be substituted for "jurisdiction" in most statements of this principle. For example, in *Paramount Unified School Dist. v. Teachers Assn. of Paramount* (1994) 26 Cal.App.4th 1371, 1386-1388, cited at OBM 22, a public agency objected to a petition to confirm an arbitration award on the ground that no notice of claim had been filed under the Tort Claims Act. The court held that a notice of claim was not an element of the statutory proceeding to confirm an arbitration award, unlike the Tort Claims Act. The word "jurisdiction" appears once in the opinion, in a quotation from an earlier decision. The court was able to apply this principle to the facts before it without using the word "jurisdiction."

So it is here. Courts applying section 1170.95 cannot import elements of (for instance) habeas corpus procedure, or procedure under Propositions 36 and 47, that are different from the procedure the Legislature set forth in section 1170.95.

E. *Summary*

The two questions on which the Court granted review must be addressed in light of a statutory text, and established principles of statutory construction, that establish a minimal burden on unrepresented defendants and a low threshold for appointment of

counsel. The statute is to be construed more generously to defendants than respondent would construe it.

* * * * *

2. Upon filing a facially sufficient petition, the defendant has a right to counsel prior to the court's consideration of the record of conviction

A. *Introduction*

> As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose. We begin with the plain language of the statute, affording the words of the provision their ordinary and usual meaning and viewing them in their statutory context, because the language employed in the Legislature's enactment generally is the most reliable indicator of legislative intent. The plain meaning controls if there is no ambiguity in the statutory language. If, however, the statutory language may reasonably be given more than one interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute.

(*People v. Cornett* (2012) 53 Cal.4th 1261, 1265 [internal citations and quotation marks deleted].) "Ultimately we choose the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute. [Citations.]" (*Mays v. City of Los Angeles* (2008) 43 Cal.4th 313, 321.)

Mr. Lewis submits that the plain meaning of "review the petition" in the first sentence of subdivision (c) demonstrates that the courts below erred by reviewing the prior appellate opinion before appointing counsel for him. If the Court disagrees, the "various extrinsic aids" lead to the same conclusion.

B. *Legislative history confirms this interpretation of subdivision (c)*

The majority and dissenting opinions in *People v. Tarkington* explore the legislative history of SB 1437 at length. (49 Cal.App.5th at pp. 902-907, 918-924.) Justice Lavin in dissent has the better of the argument.[5/]

A two-step process was introduced only in the final version of the bill. Propositions 36 and 47, with their single-step process (OBM 50-51), might be legitimate analogies had one of the earlier versions of the bill been enacted, but the final bill included a process significantly different from those two initiatives. (See SB 1437, introduced Feb. 16, 2018, at p. 9; *id.*, as amended May 25, 2018, at p. 9.)[6/] The Court of Appeal in the present case erred by importing the procedure from the two initiatives into section 1170.95. (*Lewis II*, 43 Cal.App.5th at pp. 1137-1138; see ABM 19, 31, 58.)

"The legislative evolution of section 1170.95 demonstrates, if anything, an increasing reluctance by the Legislature to impose on trial courts the responsibility to perform an initial substantive review" without the assistance of counsel. (*Cooper*, 2020 Cal.App. LEXIS 836 at p. *30.) Every version of SB 1437, including the

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5. Respondent cites the majority opinion in *Tarkington* numerous times, on this and other issues, but never acknowledges the existence of Justice Lavin's dissent.

6. Simultaneously with the filing of this brief, judicial notice is being sought of the two preliminary drafts of SB 1437, and of the legislative history document referred to in argument 2.C, immediately *infra*.

one that was enacted, contemplated that the court would *not* review the record of conviction without the guidance of counsel. (*Tarkington,* 49 Cal.App.5th at pp. 918-920 (dis. opn.).) The first draft, but not the version finally enacted, allowed the court to assemble the record of conviction sua sponte, but even the first draft directed the court to simultaneously solicit briefing from counsel. (SB 1437, introduced Feb. 16, 2018, at p. 9.) Since the first draft of the bill called for the superior court to assemble the record of conviction, but the enacted bill did not, the Court of Appeal in this case erred by authorizing the superior court to do so, as though the earlier draft had been enacted. (*Lewis II*, 43 Cal.App.5th at pp. 1137-1138.)

Every version of the bill contemplated the appointment of counsel upon the filing of a facially sufficient petition. Justice Lavin explained how the Judicial Council made known its belief that: this is what the bill meant, the bill was deficient for this reason, and a bill allowing courts to summarily deny petitions prior to the appointment of counsel would be preferable. He explained why the letters from the Judicial Council[7/] are appropriately considered in interpreting this statute. (*Tarkington,* 49 Cal.App.5th at pp. 921-924 (dis. opn.), citing *Pacific Bell v. Public Utilities Com.* (2000) 79 Cal.App.4th 269, 279, and *Ghanooni v. Super Shuttle* (1992) 2 Cal.App.4th 380, 387-388.)

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7. In its order granting review, the Court took judicial notice of these letters.

Even though the letters arrived after the final vote for passage of the bill, and so did not affect the votes of individual legislators, they are nevertheless relevant. First, the Judicial Council, the agency with subject-matter expertise and also the agency tasked with implementing the new statute, *believed* it did not contain authority for summary denial. Second, the Council wrote the Governor before he took action on the bill, and he signed the bill notwithstanding that the Council, in its expertise, (a) believed this is what the bill meant and (b) believed it was unwise for that reason. The letters are relevant to statutory interpretation not because they could have influenced legislators directly, but because they demonstrate what the text meant to the agency with subject-matter expertise. The *Tarkington* majority viewed the potential theories of relevance too narrowly. (49 Cal.App.5th at p. 907.)

In particular, the *Tarkington* majority concluded that comments to the Governor from the Judicial Council about court-related bills count for less than similar comments from executive branch agencies about bills within their purview. (*Id.* at pp. 906-907.) That distinction is not self-evident, and the rationale articulated in decisions cited by the *Tarkington* majority appears to apply equally to the letter at issue here. (E.g., *Elsner v. Uveges* (2004) 34 Cal.4th 915, 934, fn. 19.)

C. *The Legislature recognized that local agencies would incur costs for counsel, and invoked the reimbursement process for state-mandated local programs*

Respondent does not address this aspect of the legislative history. (OBM 26-27; see also *Tarkington*, 49 Cal.App.5th at p. 926 (dis. opn.).) Legislative staff advised the Senate: "Unknown, potentially-major workload costs in the millions of dollars to the courts to process and adjudicate petitions." "Unknown costs to county District Attorneys' Offices and Public Defenders' Offices to litigate petitions for resentencing. These costs likely would be reimbursable by the state, the extent of which would be determined by the Commission on State Mandates." (Senate Floor Analysis, May 29, 2018, at pp. 6-7.)

D. *Section 1170.95 should be construed to avoid serious constitutional questions that would be presented by the denial of counsel*

If section 1170.95, subdivision (c), is interpreted as Mr. Lewis urges, only the petition may be reviewed prior to appointment of counsel. In other words, the defendant has a *statutory* right to counsel prior to the court's review of the record of conviction. There are many reasons to interpret the statute in that way. One is that this interpretation obviates any need to address the scope of the federal or state *constitutional* right to counsel. (OBM 27-28.) Respondent does not address the rule of constitutional avoidance, apparently believing that the constitutional questions break so clearly in his favor that this rule is not impli-

cated. (See ABM 56-63.) They do not. (See OBM 28-31 & immediately *infra*.)

E. *The constitutional right to counsel attaches at a "critical stage," that is, any stage at which advocacy is required*

1. *A stage at which a section 1170.95 petition could be denied based on the record of conviction is a critical stage*

The court's review of the record of conviction in connection with a section 1170.95 petition is a "critical stage" at which the defendant has a constitutional right to counsel. (OBM 28-37.) "[C]ritical stages can be understood as those events or proceedings in which the accused is brought in confrontation with the state, where potential substantial prejudice to the accused's rights inheres in the confrontation, and where counsel's assistance can help to avoid that prejudice." (Gardner v. Appellate Division (2019) 6 Cal.5th 998, 1004-1005.) While the defendant initiates the petition, the petition is not based on the record of conviction and Gardner's passive phrase "brought in confrontation with the state" accurately describes the use of the record of conviction in a section 1170.95 case.

SB 1437 changed the substantive law of murder. Mr. Lewis asserts that he has a right not to be convicted of murder as that offense is now defined. (CT 2; *Drayton, supra,* 47 Cal.App.5th at p. 973.) Respondent errs when he attempts to diminish the right to counsel by referring to section 1170.95 as a procedure for reduction of *sentence* alone. (ABM 58-59.) In particular, the

analogy to section 1170.126 (Proposition 36), a resentencing statute, fails for this reason. (ABM 58; see *People v. Perez* (2018) 4 Cal.5th 1055, 1063-1064.) Respondent's references to section 1170.95 as an act of "lenity" that does not implicate the Constitution (ABM 52, 58, 59, 60, 62), are cited to *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1156, which in turn cites *Perez*, so they are not an independent basis to deny counsel.[8/]

In *People v. Rodriguez* (1998) 17 Cal.4th 253, the defendant had a constitutional right to counsel, without the judge as gatekeeper deciding in advance whether he really needed counsel, where a change in the law entitled him only to resentencing. A fortiori, he has the same right here. (OBM 29-30.) Respondent distinguishes *Rodriguez* because, unlike in this case, the trial judge there had committed "error" when the case was first before him. (ABM 62.) The attempted distinction rings hollow. The judge in *Rodriguez* did not commit "error" based on the law at the time of sentencing. While the case was on appeal, this Court held that judges had sentencing discretion beyond that previously authorized. Similarly here, after Mr. Lewis's trial was over, the Legislature changed the elements of the offense for which he was

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8. Respondent's argument on this point is based on cases interpreting the constitutional right to *jury trial*. The present case concerns a stage which respondent himself says does not involve factfinding. (ABM 39.) Assuming that in some contexts the constitutional rights to counsel and jury trial are coextensive, in this situation they are not. Cases interpreting the right to jury trial are of dubious value in interpreting the right to counsel here.

convicted. Respondent says more than once that the constitutional right to counsel attaches only in proceedings to correct trial court error, but he doesn't say why. (ABM 59, 62.) The actual context of *Rodriguez* refutes respondent's point.

Mr. Lewis cited *People v. Fryhaat* (2019) 35 Cal.App.5th 969, 980, for the rule of constitutional avoidance. (OBM 28.) Respondent implies that its very different context – an evidentiary hearing and an unavoidably absent defendant – somehow establishes an outer limit for the constitutional right to counsel. (ABM 60.) It does not.

2. *No clear and enforceable line can be drawn to identify some section 1170.95 petitions for which advocacy by counsel is less "critical"*

Respondent assumes that "review the petition" in the first sentence of subdivision (c) does not mean what it says, and that there are some cases in which the court can safely go beyond the petition prior to appointing counsel. Beyond the inconsistency of this argument with the words of the statute, there is an additional problem with this argument:

Respondent cannot articulate an alternative construction of the statute that is clear and enforceable and does not risk summary denial at the first step of some petitions for which counsel would, at the second step, be able to plead a prima facie case after examining the record of conviction. By quotation from *People v. Verdugo* (2020) 44 Cal.App.5th 320, 329-330, *petn. for review granted & held*, No. S260493, he sets forth a non-exclusive list of categories in which summary denial without counsel "might" be

appropriate. (ABM 24; see ABM 41, fn 5.)[9/] Respondent says that some "particular type[s] of conviction[s]" can safely result in summary denial at the first step. (ABM 45.) *Tarkington*, in which there was a single perpetrator and no basis to impute malice (49 Cal.App.5th at p. 899), may be an easy case (ABM 24), but a workable rule cannot be articulated that denies counsel to Tarkington while guaranteeing counsel to all the defendants described at OBM 32-36, including Mr. Lewis.[10/]

For the same reason, *Drayton*'s rule that petitions that are "untrue as a matter of law" (47 Cal.App.5th at p. 980) may be summarily denied based on the record of conviction, is unworkable.[11/] For example, *People v. Murillo* (2020) 2020 Cal.App. LEXIS 838 at pp. *18-*22, reviewed the prosecution and defense facts from the prior appellate opinion, identified facts favorable to

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9. The list includes cases in which the section 12022.53, subdivision (d), firearm enhancement has been found true. For the reasons stated in *People v. Offley* (2020) 48 Cal.App.5th 588, 598-599, summary denial in such cases would be error. (See also *Cooper*, 2020 Cal.App. LEXIS 836 at p. *37 [citing *Offley* with approval].)

10. Elsewhere, respondent opposes the appointment of counsel where "both parties and the court are aware there is no legal possibility for relief." (ABM 13.) But if the defendant, without the assistance of counsel, is "aware" of this, he will not submit a section 1170.95 petition under penalty of perjury in the first place. This argument against appointment of counsel implicitly assumes the guidance of counsel.

11. Because counsel was appointed in *Drayton*, that opinion is not authority on when an *uncounseled* petition may be denied.

the prosecution that were "overwhelmingly important," and said facts favorable to the defendant were "less important." Applying decisions from long after the trial and initial appeal,[12/] the court concluded "as a matter of law" that Murillo could not make a "prima facie case" for relief, and affirmed summary denial of his section 1170.95 petition.

Justice Lavin accurately described any and all potential alternative rules as "amorphous." (*Tarkington*, 49 Cal.App.5th at p. 924 (dis. opn.).)

Since cases in which the assistance of counsel would or would not be "critical" cannot be identified in advance, the constitutional right to counsel extends to all section 1170.95 petitions. Alternatively, the same uncertainty supports Mr. Lewis's interpretation of the statutory right to counsel.

3. *Collateral estoppel or law of the case does not mean that Mr. Lewis does not need counsel*

Respondent invites the Court to rely on a case-specific theory of collateral estoppel or law of the case to hold that Mr.

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12. *People v. Banks* (2015) 61 Cal.4th 788 and *People v. Clark* (2016) 63 Cal.4th 522.

This case does not present the question whether a defendant as to whom a felony-murder special circumstance has been found true may plead a prima facie case under section 1170.95 by proffering evidence that the special circumstance finding is inconsistent with *Banks* or *Clark, supra.* (See OBM 32-33; ABM 44-47.) A petition presenting that question, *People v. Smith (David)*, No. S262835, has been granted and held to await decision of this case. For present purposes, it suffices that the superior court cannot deny such a petition without appointing counsel to advocate for the defendant.

Lewis did not need counsel. (ABM 36-38; see also ABM 13-15.)[13/] Respondent's argument is without merit. (OBM 35-36; Petn. for Review 25-28.) As respondent recognizes, for collateral estoppel to apply, "[t]he issue to be precluded must be identical to one decided in a prior proceeding." (ABM 36.) Here, it is not. In 2014, the Court of Appeal applied the prejudice standard of *Chapman v. California* (1967) 386 U.S. 18. "The reviewing court conducting a harmless error analysis under *Chapman* looks to the 'whole record' to evaluate the error's effect on the jury's verdict." (*People v. Aranda* (2012) 55 Cal.4th 342, 367, quoting *Rose v. Clark* (1986) 478 U.S. 570, 583.) In 2019, by contrast, the superior court was testing for a prima facie case, examining not the whole record but only the evidence favorable to Mr. Lewis, without considering the possibility of contradiction. This is a different question, tested by a standard more favorable to Mr. Lewis, than in the 2014 appeal. The quotation from the 2014 appellate opinion at ABM 15 (and the narrative at ABM 13-15 more generally) is patently not the version of the facts most favorable to Mr. Lewis. Insofar as the Court of Appeal believed these facts were "undisputed" (ABM 15), it erred. (See supplemental letter brief,

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13. If the Court believed that this ground were dispositive, it would have denied review because Mr. Lewis's case then would not present the generic issues the Court needs to decide. Pointedly, respondent did not file a response to the petition for review, foregoing his chance to argue that case-specific circumstances made this case inappropriate for review.

No. B241236 (June 9, 2014) at 3-4 [describing facts favorably to Mr. Lewis].)

Similarly, the law of the case doctrine applies only when the law is being applied to the same universe of facts. (Petn. for Review 28, fn. 6; ABM 36.) Here, unlike in the prior appeal, only the facts favorable to Mr. Lewis matter.

Even if the same question were presented here, which it is not, the Court should not give preclusive weight to the 2014 appellate decision because it is wrong on its own terms. The jury instructions were erroneous. (*People v. Lewis* (July 14, 2014) 2014 Cal.App. Unpub. LEXIS 4923 at p.*29 [No. B241236].) No properly-instructed jury found Mr. Lewis guilty as a direct aider and abetter. The Court of Appeal affirmed by applying *Chapman* incorrectly. (OBM 11 & fn. 3, and cases there cited.) A decision demonstrating "a manifest misapplication of existing principles" is not entitled to preclusive weight. (*People v. Shuey* (1975) 13 Cal.3d 835, 846 [law of the case].)

F. *Practical considerations support appointment of counsel whenever the court may consider the record of conviction*

Respondent never acknowledges that an incarcerated defendant may well not have access to all or part of the record of conviction. (OBM 37.) This is one more reason it is inappropriate for the superior court to review the record of conviction at a time when the defendant is unrepresented and cannot join issue on those terms.

Many petitions under section 1170.95 involve convictions that are many years, and sometimes several decades, old. Obtaining the record of conviction in such cases is frequently not a quick or easy task, even for the superior court. In many cases, it may take more than 60 days simply to obtain the files from storage or archives, and then of course additional time to review them. Recognizing this, the Legislature allowed for an extension of time for the prosecutor to respond within subdivision (c). It did not provide for any similar extension for the superior court to conduct an initial review, which further demonstrates the Legislature did not contemplate any review of the record of conviction by the superior court prior to briefing by counsel. The *Tarkington* court's assertion that a preliminary review of the record of conviction and a response by the prosecutor can all happen in 60 days (49 Cal.App.5th at p. 904, fn. 9; ABM 31) is unrealistic.

Since the prosecutor's 60 days to respond run from the defendant's service of the pro se petition, respondent's interpretation of the statute also leaves open the possibility that the court will deny the petition sua sponte on day 59, as the prosecutor is polishing his response for filing on day 60. (See *Cooper,* 2020 Cal.App. LEXIS 836 at pp. *27-*30; *Tarkington*, 49 Cal.App.5th at p. 920 (dis. opn.).) By contrast, under Mr. Lewis's interpretation, the prosecutor will know that the court will not act on the petition until after the response is filed.

G. *Superficially attractive considerations of judicial economy likely represent false economies and are outweighed by the right to counsel*

Dollars and judicial hours are not all that matters when what is at stake are liability for murder and the right to counsel. (OBM 39-42.) But even if the focus were exclusively on dollars-and-cents economy, without weighing the risk of erroneously denying the right to counsel, appointment of counsel in superior court is preferable to summary denial followed by an appeal, which respondent prefers. (ABM 41, 44, 50.) If a defendant has no chance of establishing a prima facie case, it will not cost much for appointed counsel to examine the record of conviction, give the defendant the bad news, and submit the case to the superior court without argument. Rhetoric about "a gross misuse of judicial resources" (*Lewis II*, 43 Cal.App.5th at p. 1138) is overblown. (See *Cooper*, 2020 Cal.App. LEXIS 836 at pp. *28-*29; *Tarkington*, 49 Cal.App.5th at pp. 925-927 (dis. opn.).)

An appeal requires a far greater commitment of resources than would appointment of counsel in the superior court. There will be some, but fewer, appeals by defendants for whom the superior court appoints counsel. There will be no appeal in cases in which counsel persuades the defendant to withdraw the petition, nor in cases in which counsel, after submitting the case in superior court without argument, persuades the defendant that an appeal would be futile. (See OBM 41.)

More importantly, there will be no waste of resources at all in those cases in which counsel finds, in the record of conviction

or elsewhere, a prima facie case for entitlement to relief that would not otherwise be apparent to the judge, the prosecutor, or the defendant himself. By definition, these cases cannot be identified with assurance prior to appointment of counsel for the defendant. (See argument 2.E.2, *supra,* and 3.C, *infra*.)

Economy does not end at the courthouse door. Decades of incarceration for murder, when the defendant's personal culpability is for a lesser offense with a much shorter term, has enormous financial costs to the state.[14/] The Legislature sought to amend the law so that it "fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual." (Stats. 2018, ch. 1015, § 1, subd. (e); see also Sen. Conc. Res. No. 48, Stats. 2017 (2017-2018 Reg. Sess.), res. ch. 175, at p. 1.)

Some who apply will be found not to qualify. (ABM 49; *Tarkington*, 49 Cal.App.5th at p. 910.) Litigants, particularly self-represented ones, regularly file pleadings of all kinds that, although filed in good faith, ultimately prove to lack legal merit. It is the task of the courts and counsel to apply public resources to carry out the procedures specified by the Legislature to test the merits of these claims. Conversely, some defendants will qualify who, upon first glance at the record of conviction, might appear

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14. According to the Legislative Analyst, as of 2018-19 the cost of incarceration in California was over $81,000 per prisoner per year. (https://lao.ca.gov/PolicyAreas/CJ/6_cj_inmatecost [visited September 4, 2020].)

not to. The rule of liberal construction of remedial statutes expresses a preference to make a limited commitment of resources to all cases rather than risk screening out defendants for whom counsel might be able to establish a prima facie case. The defendant is to be given the benefit of the doubt. (See *Cooper*, 2020 Cal.App. LEXIS 836 at pp. *10, *37-38 [error to deny counsel to defendant whose "likelihood of success" appears "remote"]; *People v. Flores* (2020) 2020 Cal.App. LEXIS 839 at pp. *11-*12 [similar reasoning warrants independent judicial review when counsel files a *Wende* brief in a section 1170.95 appeal].)

H. *Denial of counsel cannot be harmless error*

Erroneous denial of counsel, whether the right is constitutional or statutory, has "consequences that are necessarily unquantifiable and indeterminate,'" so "[h]armless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 150.)

In *People v. Lightsey* (2012) 54 Cal.4th 668, 698, the Court held that denial of a *statutory* right to counsel was a miscarriage of justice that could not be harmless. (OBM 43-45.) Respondent distinguishes *Lightsey* by assuming it concerned a *constitutional* right to counsel. (ABM 61.) It did not. But for purposes of assessing prejudice, the Court held that the statutory violation was comparable to a constitutional violation. (54 Cal.4th at p. 701.)

Lightsey is both a more recent decision and a closer analogy than *People v. Epps* (2001) 25 Cal.4th 19, 29, applying the *Watson* prejudice test to denial of a statutory right to jury trial of prior conviction enhancements. (ABM 61.) Epps had counsel, who contested the issue of identity at the bench trial of the priors (*ibid.*); it cannot be assumed that denial of *counsel* would have been harmless error in *Epps*. The difference between a section 1170.95 petition and a prior conviction enhancement is discussed at OBM 52-54, making a different point, but that discussion is instructive here. A prior conviction allegation is usually difficult to credibly defend against, but here counsel could have reviewed the record of conviction and, testing the facts against the amended law, made a prima facie case that Mr. Lewis was entitled to section 1170.95 relief. (See OBM 35-36.)

Even if the right is only statutory, denial of counsel to Mr. Lewis was prejudicial.

I. *Conclusion*

Analyzing the record of conviction to determine whether a defendant can make a prima facie case for relief from his conviction for murder under section 1170.95 can present complicated legal and factual questions, so it requires advocacy. It is not a ministerial act. The stakes are high: liability for murder. In constitutional terms, it is a "critical stage" of the criminal process. Either by statutory construction or by constitutional interpreta-

tion, the Court should require that appointment of counsel precede any consideration of the record of conviction.

* * * * *

3. Superior courts may consider the record of conviction only in connection with the second prima facie showing, after counsel has been appointed

A. *Introduction*

Defendant's counsel, in the course of making the *second* prima facie showing of entitlement to relief, and a prosecutor arguing to the contrary, can and should make use of the record of conviction, in addition to whatever other allegations defendant pleads. But Mr. Lewis's case never reached that stage. It is improper for a court to rely on the record of conviction to deny an uncounseled petition at the *first* prima facie stage in subdivision (c). Use of the record of conviction at the first stage, as the courts below did in this case, is inconsistent with the text, structure and purpose of section 1170.95.

B. *Prior to the appointment of counsel, the statute limits the court to considering the petition, not the record of conviction*

In section 1170.95, the Legislature adopted a materially different process than is set forth in sections 1170.18 [Proposition 47] and 1170.126 [Proposition 36]. (OBM 50-51.) The courts must follow the process prescribed by the Legislature. There are no gaps in section 1170.95 to fill in by analogy to Propositions 36 and 47. The Court of Appeal did not fill in gaps, but did something even more improper: substitute the provisions of Propositions 36 and 47 for the different process prescribed by the Legislature in section 1170.95. (*Lewis II,* 43 Cal.App.5th at pp. 1137-

1138.) Respondent cites this passage of the Court of Appeal opinion but does not defend it. (ABM 19, 31.)

It does not matter *why* the Legislature prescribed a different process in section 1170.95, but a logical reason suggests itself: the review of the record of conviction in light of amended sections 188 and 189 is likely to be more complicated, and hence more in need of the guidance of counsel, than the process required to determine if a defendant is entitled to relief under Proposition 36 or 47. (OBM 36-37.)

C. *The record of conviction will often yield incomplete, inaccurate, or irrelevant information when consulted in connection with the first prima facie case in subdivision (c)*

Even if subdivision (c) allowed the court to look beyond the petition before appointing counsel, which it does not, it would be inappropriate and unwise for the court to consult the record of conviction without the benefit of adversary briefing. Doing so creates an unacceptable risk of erroneous denials of section 1170.95 petitions. Unlike in *People v. Woodell* (1998) 17 Cal.4th 448, 454-455, the record of conviction often does not provide either a clear or an authoritative answer to the questions presented by a section 1170.95 petition. (OBM 52-55; argument 1.B, *supra*; cf. ABM 52-54.)

Under section 1170.95, the defendant must plead, first, that the charging document "allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine," not that the prosecution actually so

proceeded. Second, he must plead that he was convicted of murder. Third, he must plead that he could not be convicted of murder under the 2018 amendments. (Subd. (a).) As to each of these elements, he need only plead a prima facie case; the court must view the facts in the light most favorable to him. Mr. Lewis's opening brief is correct to say, "the ultimate question is whether, given the change in the law, the defendant *should have been* convicted of the crime for which he was actually convicted." (OBM 53 [emphasis original]; cf. ABM 52.)

Respondent would allow the court to review the record of conviction, including the prior appellate opinion, at the first step, without the guidance of counsel, "to reveal what was ultimately proved or found" at trial. (ABM 53.) Respondent's position is wrong for multiple reasons. First, the only aspect of "what was ultimately proved or found" that matters at the first step is that the defendant was found guilty of murder. Second, as in this case, the *facts* that were "ultimately proved or found" at trial, or the facts set forth in an appellate opinion, are unlikely to be the facts in the light most favorable to the defendant.

The *Tarkington* majority expressed confidence that the court can decide "most or at least many cases" without advocacy from counsel based on "indisputable portions of the record." (49 Cal.App.5th at p. 909.) There is a risk that propositions are more likely to look "indisputable" if there is no counsel tasked with disputing them. Moreover, the *existence* of various portions of the record may be indisputable while their *significance*, or lack of

significance, for the prima facie question is very much open to dispute. (See OBM 53, fn. 10.)

Portions of the record of conviction are likely to be relevant to the section 1170.95 inquiry, but counsel is likely to offer meaningful assistance to the court in identifying *which* portions are relevant. And, unlike in *Woodell*, the record of conviction will never be conclusive at this stage, at least if the defendant was charged with murder.

D. *The statement of facts in an appellate opinion cannot be relied on to defeat the statutory prima facie case requirement*

Respondent is untroubled that – squarely contrary to the meaning of a prima facie case in the defendant's favor – courts interpreting section 1170.95 as he does are summarily denying petitions based on statements of facts in appellate opinions, set forth in the light most favorable to the prosecution. (See OBM 55-57.)[15/]

Elsewhere respondent acknowledges that a court cannot deny an order to show cause by making factual findings adverse to the defendant. (ABM 25 & 42-43, fn. 7.) But from an appellate statement of the facts most favorable to the prosecution, a court often cannot discern how weak or strong was the defendant's evi-

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15. He accurately states that that did not happen in this case. (ABM 53.) But the reliance of the courts below on a *legal holding* in the prior appellate opinion was error for a different reason, discussed in argument 2.E.3, *supra*.

dence to the contrary at trial. (See also *Cooper,* 2020 Cal.App. LEXIS 836 at pp. *33-*34 [for similar reasons, error to deny uncounseled section 1170.95 petition based on preliminary hearing transcript].) And the appellate statement of facts says nothing about additional facts proffered or to be proffered in the section 1170.95 process. In many if not most cases, a court relying on the appellate statement of facts is implicitly making forbidden factual findings adverse to the defendant. (See *Murillo, supra,* 2020 Cal.App. LEXIS 838 at pp. *18-*22 [reviewing prior appellate opinion, deciding prosecution-favorable facts are more "important," and concluding "as a matter of law" that defendant cannot make a prima facie case under section 1170.95].)

E. *Summary*

The Court asked, "May superior courts consider the record of conviction in determining whether a defendant has made a prima facie showing of eligibility for relief under Penal Code section 1170.95?" The answer is yes, but only after counsel has been appointed, that is, only at a stage which Mr. Lewis's case was never permitted to reach.

* * * * *

4. If summary denials of uncounseled petitions are permitted, the denials must be without prejudice and with leave to amend

A. *The courts below construed the statute in a manner not reasonably foreseeable to unrepresented litigants such as Mr. Lewis, in violation of their right to due process*

In asserting that there is no unfairness in the process (ABM 49-50, 54-55), respondent never mentions that Mr. Lewis and hundreds of other defendants submitted their pro se petitions on a form not of their own making. (CT 1-3.) Respondent says this form is inadequate as a matter of law and petitions containing only the information called for by this form may be summarily denied, even though the form is phrased in the language of the statute. (But see *Cooper*, 2020 Cal.App. LEXIS 836 at p. *38 [the form is sufficient to obtain appointed counsel].) Respondent never mentions that these defendants were advised by an organization instrumental in drafting section 1170.95 that submitting this form would be sufficient to obtain appointed counsel, a proposition that respondent asserts is false. (OBM 58-59.) Respondent does not cite *People v. Perkins* (2016) 244 Cal.App.4th 129, 141, which recognized a similar reliance interest when defendants used printed forms to seek relief under Proposition 47.

Even if respondent is right that "*Lewis II* does not impose any requirements on petitioners that are not already present in the statute" (ABM 50), Mr. Lewis and other defendants reasonably relied on advice to the contrary. That is the due process

violation explained at OBM 59-61. It exists no matter what this Court decides subdivision (c) actually means.

B. *If counsel is not appointed for Mr. Lewis to litigate the current petition, he should be allowed to file an amended petition*

Respondent's opposition to a remand with leave to amend is contingent on the merits of his other arguments. (ABM 55.)

* * * * *

CONCLUSION

The decisions of the Court of Appeal and the superior court should be reversed. The superior court should be directed to appoint counsel for Mr. Lewis and thereafter to proceed in the manner prescribed by section 1170.95.

Respectfully submitted September 16, 2020.

/s/ *Robert D. Bacon*
ROBERT D. BACON
Attorney for Appellant

CERTIFICATE OF BRIEF LENGTH
(Rule 8.520(c)(1))

This brief contains **8,291** words.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/ *Robert D. Bacon*
ROBERT D. BACON

DECLARATION OF SERVICE BY MAIL & E-MAIL

I am over the age of 18 years and not a party to this case. My business address is: PMB 110, 484 Lake Park Avenue, Oakland, California 94610; bacon2254@aol.com.

On September 16, 2020, I served **APPELLANT/PETITIONER'S REPLY BRIEF ON THE MERITS** by placing a true copy in an envelope addressed to each person named below at the addresses shown, and by sealing and depositing the envelope in the U.S. Mail at Oakland, California, with postage fully prepaid. There is delivery service by U.S. Mail at each of the places so addressed, and there is regular communication by mail between the place of mailing and each of the places so addressed.

Clerk of the Superior Court
[ATTN: Hon. Ricardo Ocampo]
200 W. Compton Blvd.
Compton, CA 90220

Mr. Vince Lewis
AL6235
Substance Abuse Treatment Facility
P.O. Box 5248
Corcoran, CA 93212

On the same day, I also served the same document on each of the persons named below by attaching a PDF copy to an E-mail addressed as indicated:
Idan Ivri, counsel for respondent: DocketingLAAWT@doj.ca.gov & idan.ivri@doj.ca.gov
The District Attorney: truefiling@da.lacounty.gov
The California Appellate Project: capdocs@lacap.com
Jennifer Cheng, Mr. Lewis' trial attorney, jcheng@apd.lacounty.gov

I declare under penalty of perjury that the foregoing is true and correct.

Signed on September 16, 2020, at Oakland, California.

/s/ Robert D. Bacon